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MANAGEMENT PARTNERS, LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LENHOFF ENTERPRISES, INC., a California corporation dba LENHOFF & LENHOFF,

Plaintiff,

v.

UNITED TALENT AGENCY, INC., a California corporation; INTERNATIONAL CREATIVE MANAGEMENT PARTNERS LLC, a Delaware limited liability company; and DOES 1 through 5, inclusive,

Defendants.

Case No. 2:15-CV-01086-BRO (FFMx)

DEFENDANT INTERNATIONAL CREATIVE MANAGEMENT PARTNERS, LLC'S NOTICE OF MOTION TO DISMISS SECOND AMENDED COMPLAINT AND MEMORANDUM OF POINTS AND AUTHORITIES;

[Fed. R. Civ. P. 12(b)(6)]

Date: December 21, 2015
Time: 1:30 p.m.
Place: Courtroom 14
Judge: Hon. Beverly Reid O'Connell

NOTICE

TO THE COURT, ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on December 21, 2015, at 1:30 p.m., or as soon thereafter as the matter may be heard, in Courtroom 14 of the United States District Courthouse, 312 North Spring Street, Los Angeles, California, before the Honorable Beverly Reid O'Connell, Defendant International Creative Management Partners, LLC will, and hereby does, move this Court for an order dismissing the Second Amended Complaint ("SAC"). This Motion is made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that the SAC fails to allege facts sufficient to state any claim upon which relief can be granted.

This Motion is based upon this Notice, the accompanying Memorandum of Points and Authorities, the Request for Judicial Notice, the [Proposed] Order Granting Defendant International Creative Management Partners LLC's Motion To Dismiss Second Amended Complaint, any reply memorandum, the filings in this action, and such other matters as may be presented at or before the hearing.

This Motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on November 2, 2015.

DATED: November 9, 2015

PERKINS COIE LLP

By: */s/ Michael Garfinkel*
Michael B. Garfinkel

Attorneys for Defendants
INTERNATIONAL CREATIVE MANAGEMENT PARTNERS, LLC

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INTRODUCTION

In the latest iteration of its complaint, Plaintiff Lenhoff Enterprises, Inc. dba Lenhoff and Lenhoff ("Plaintiff") concedes that four of the most successful talent agencies—Defendant United Talent Agency ("UTA"), Defendant International Creative Management Partners LLC ("ICM Partners"), William Morris/Endeavor ("WME") and Creative Artists Agency ("CAA")—vigorously and intensely compete against each other and other talent agencies for the opportunity to represent the directors, writers, and actors sought by studios, networks, producers and other buyers of talent for the production of scripted television series. Plaintiff affirmatively alleges that no single talent agency dominates the others, and the top four talent agencies each have roughly similar shares of the alleged relevant market, as Plaintiff proposes to define it. At the same time, the market is characterized by steady and robust growth, with the number of packaged scripted television series having more than doubled, according to Plaintiff, during the relevant time period. These are the well-recognized hallmarks of a competitive market, not the stuff of antitrust.

Despite those real-world economic facts, or perhaps because of them, Plaintiff attempts to conjure a Section 1 antitrust conspiracy claim from three baseless hypotheses, each of which takes the catch phrase "conspiracy theory" to new heights since they are based on nothing more than rank speculation. Lacking any factual support whatsoever, Plaintiff alleges that Defendants UTA and ICM Partners violated federal antitrust law by agreeing among themselves, and with alleged co-conspirators WME and CAA: (1) "that it was in their best interests to proceed without Rule 16(g)," (2) to "engage and continue to engage in exclusive co-packaging contracts," and "have a policy not to split packaging fees" with agencies other than themselves, and (3) to threaten and coerce studios, networks,

and producers to refuse to deal with talent agents, such as Plaintiff, who were not part of the alleged conspiracy.

Not surprisingly, the Second Amended Complaint ("SAC") contains not a single factual allegation that describes the formation and operation— the "who, did what, to whom (or with whom), where, and when?"— of the supposed conspiracy, as required by well-established Ninth Circuit precedent when the plaintiff attempts to plead a Section 1 claim based on direct evidence of an illegal agreement. Similarly, Plaintiff has not pled facts to show that UTA and ICM Partners engaged in parallel conduct from which a conspiracy could be inferred. Even if Plaintiff could allege that Defendants both engaged in sudden and simultaneous anticompetitive conduct, as required to plead an antitrust conspiracy using circumstantial evidence, Plaintiff fails to do so. The conduct that Plaintiff alleges, which is taken as true for present purposes only—joint opposition to Rule 16(g), avoiding co-packaging to retain more of the package commission for itself, and "pressuring" common customers to choose Defendants' clients over clients of their competitors—is all fully consistent with the unilateral adoption of rational and legal competitive business strategies prompted by competitors' common perception of marketplace events, which, as a matter of law, renders implausible any inference of an illegal agreement.

In any event, the antitrust claim fails because Plaintiff has not, and cannot, allege that it suffered injury *as a result of* the alleged antitrust conspiracies. The core of this case is Plaintiff's claim that it failed to retain two clients—Client #1 hired UTA, and Client #2 engaged ICM Partners—because those agencies, in effect, offer clients more opportunities and charge lower commissions, not because of the demise of Rule 16(g), a refusal to co-package with Plaintiff, or any imagined studio boycott of Plaintiff. Despite multiple attempts to amend its pleading, there is no factual allegation in the SAC that remotely suggests a causal link between Plaintiff's alleged injuries, *i.e.*, the departure of Clients #1 and #2, and the various

antitrust conspiracies that Plaintiff has concocted. Thus, try as it might, Plaintiff cannot convert these run-of-the-mill, state law tort claims into a federal antitrust case, even if those state law claims were not otherwise defective, which they are.

Despite being afforded a third opportunity to re-plead, and having the added benefit of the Court's guidance about the deficiencies it observed in Plaintiff's previous pleading, Plaintiff's tortious interference claims still fail as a matter of law. Since Plaintiff has failed to plead an antitrust claim, the new pleading still lacks any factual allegations that could satisfy the independently wrongful act element that is required to state a claim for both tortious interference with prospective economic advantage and tortious interference with contract.

In addition, Plaintiff's tortious interference with contract claim is defective because Plaintiff now concedes that its agreement with Client #2 was oral, not written, and Plaintiff has failed to allege any additional facts that could demonstrate that the oral agreement between it and Client #2 was for a specified term, and not terminable at will. Plaintiff alleges that the oral agreement had an initial term of two years, followed by a two-year and multiple one-year renewal terms, which means it would be unenforceable because of the statute of frauds. Similarly, Plaintiff's attempt to rely on Rider D to the ATA/DGA Agreement fails because Rider D cannot apply to create a term agreement where none existed in the first place, and Plaintiff's claim that Rider D prohibits Client #2 from terminating Plaintiff's agreement rests upon a flawed interpretation and misapplication of Rider D that is apparent on its face. Finally, Plaintiff has not alleged any facts to show that Client #2 was under contract at the time Client #2 left Plaintiff, for example, by electing to renew the agreement, since the agreement commenced some five years earlier.

No amount of re-pleading can cure the legal defects in the SAC, and, consequently, the Court should dismiss Plaintiff's antitrust and tortious interference claims with prejudice. In the interests of judicial economy, the Court may also

consider reassessing its interlocutory order denying ICM Partners' motion to dismiss Plaintiff's claim under the California UCL because, as pled, it too requires sufficient factual allegations of a conspiracy that are wholly lacking from the SAC, in which case the entire action should be dismissed with prejudice.

FACTUAL BACKGROUND AND PLAINTIFF'S ALLEGATIONS

On September 18, 2015, this Court granted Defendants' respective motions to dismiss Plaintiff's First Amended Complaint with respect to its causes of action for conspiracy to monopolize under Section 2 of the Sherman Act, as well as claims for tortious inference with contract and with prospective economic advantage.[1] Order Granting in Part and Denying in Part Defendants' Motions to Dismiss, Dkt No. 28, at 12 ("Order"). Specifically, as to the Sherman Act claim, the Court held that Plaintiff could not sustain a conspiracy to monopolize claim under Section 2 based on a "joint" or "shared" monopolization theory, unless Plaintiff could allege "facts indicating that a conspiracy exists to create a monopoly in a single entity." *Id.* at 7. As to the interference claims, the Court held that Plaintiff had failed to plead "whether the contractual relationships were at will or for a specified term" and failed to allege a predicate violation under the Sherman Act sufficient to defeat the competitor's privilege. *Id.* at 9-10. The Court granted leave to amend. *Id.*

On October 2, 2015, Plaintiff filed its Second Amended Complaint. *See generally* Dkt. No. 31 ("SAC"). Rather than pleading additional facts sufficient to state a claim under Section 2 of the Sherman Act, Plaintiff instead attempts to resuscitate the antitrust claim by purporting to allege a conspiracy in restraint of trade under Section 1 of the Sherman Act. *Id.* ¶¶ 117-21. Plaintiff also attempts to re-plead claims for intentional interference with contract, intentional interference with prospective economic advantage, and continues to assert its claim for violation

[1] The Court also granted Defendants' motions to dismiss Plaintiff's unjust enrichment and declaratory relief claims, but allowed Plaintiff's claim under California's Unfair Competition Law ("UCL") to proceed. *See generally* Dkt. No. 28 at 7-8, 12.

of the UCL. *See generally id.* Despite adding more than *thirty* pages to the operative complaint, however, Plaintiff's new, pertinent allegations against ICM Partners are barely noticeable and contained in but a handful of paragraphs, amounting to only the following:

"Conspiracy" Allegations

Without alleging any additional details surrounding the formation or operation of the alleged conspiracy, Plaintiff now alleges the following three putative agreements.

First, Plaintiff continues to allege that ICM Partners, UTA, WME, and CAA (collectively, the "Agencies") "conspired and agreed, amongst themselves, that it was in their best interests to proceed without Rule 16(g)." SAC at ¶ 50.

Second, Plaintiff continues to allege that the Agencies "engaged and continue to engage in exclusive co-packaging contracts" and "have a policy to not split packaging fees with other non-[Agencies]." *Id.* ¶¶ 73, 84, 104.

Third, Plaintiff alleges that the Agencies "conspired and agreed to form a group boycott, whereby buyers of top-tiered talent services," including studios, networks, and producers are "coerced by the [Agencies] … to refuse deals with non-core agencies and those they represent (talent)." *Id.* ¶ 119. Plaintiff claims that this alleged boycott is carried out through "(i) agreements between UTA and ICM [Partners] to restrict co-packaging scripted TV deals to each other and/or with WME and CAA, but to the exclusion of non-core agencies; and by (ii) the use of veiled threats . . . against the buyers of talent services (studios/networks/producers) not to deal with non-core talent agents in the scripted TV market or else face the loss of future packages." *Id.*

In addition to attempting to allege that UTA and ICM Partners entered into alleged anticompetitive agreements, Plaintiff sprinkles into the SAC nearly every buzzword available in antitrust jurisprudence, without any factual or logical support. For example, Plaintiff uses the words "horizontal price fixing," "market

division," "allocating . . . [the] market," "tying," and "predatory pricing," without attempting to plead any of the facts that could support the elements of those potential violations. *E.g. id.* ¶¶ 73, 83-84, 119-20. Nowhere, however, does Plaintiff plead any meaningful details supporting a conspiracy to carry out these alleged acts.

Contract Allegations

Plaintiff alleges that Client #2 "terminat[ed] his exclusive contract with Plaintiff" on June 26, 2014. *Id.* ¶¶ 25-26, 128. Plaintiff admits that the purported contract with Client #2 "was a verbal contract," not a written one. *Id.* ¶ 128. Plaintiff claims that the oral contract with Client #2 "commenced on or about February 10, 2009, for an initial term of 2 years, with a 2-year renewal term, followed by 1-year terms," but Plaintiff fails to plead whether Client #2 elected to renew, under what terms such renewal occurred, or whether any term was in effect at the time that Client #2 "terminat[ed]" his contract with Plaintiff in June of 2014. *Id.*

Perhaps recognizing this failing, Plaintiff additionally claims its purported oral contract with Client #2 was "not terminable at will," not under its own terms, but because it was subject to Rider D to a separate agreement between the Association of Talent Agents (ATA) and the Directors Guild of America (DGA). *Id.* ¶¶ 9, 128.[2] Specifically, Plaintiff claims that "because [Client #2 was] at all material times, acting under the aegis of the [DGA], and because Plaintiff was, at all material times, a member of the [ATA], Plaintiff alleges that those practices, procedures, and terms set forth in Rider 'D' to the Agreement between the ATA and the DGA were/are applicable to the subject agreements between Plaintiff and Client [#2]." *Id.* ¶8; *see also id.* ¶ 128. Plaintiff goes on to allege that under Rider D, "Client #2 was unable to terminate his contract with Plaintiff, because he had

[2] Rider D is attached as Exhibit A to ICM Partners' Request for Judicial Notice ("RJN") filed concurrently herewith.

signed a contract of employment [with a third party] just days before and well within the 90-day period." *Id.* ¶ 128. In other words, Plaintiff claims that, under Rider D, because Client #2 had signed a contract of employment on June 18, 2014, which work Plaintiff procured, Client #2 was prohibited from terminating his verbal agreement with Plaintiff for the 90 days following June 18, 2014. *Id.* Suffice it to say that Plaintiff misconstrues and misapplies Rider D, as explained in more detail below.

APPLICABLE STANDARD OF REVIEW

To survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss, Plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level . . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555; 127 S. Ct. 1955, 1965; 167 L. Ed. 2d 929 (2007). The allegations must "plausibly suggest[]," and not merely be consistent with, claimed wrongful conduct. *Id.* at 557. While factual allegations are assumed true, Plaintiff must offer "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Id.* at 555. Courts are "not bound to accept as true a legal conclusion couched as a factual allegation," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678; 129 S. Ct. 1937, 1949-50; 173 L. Ed. 2d 868 (2009). In this regard, the Supreme Court has observed that it is improper to assume Plaintiff "can prove facts that it has not alleged." *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526; 103 S. Ct. 897, 902; 74 L. Ed. 2d 723 (1983).

Ultimately, the factual allegations "must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Thus, "to allege an agreement between antitrust co-conspirators, the complaint must allege facts such as a 'specific time, place, or person involved in the alleged conspiracies' to give a defendant seeking to respond to allegations of a

conspiracy an idea of where to begin." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 565 n.10). Finally, a complaint may be dismissed without leave to amend "if amendment would be futile." *Carrico v. City & Cty. of S.F.*, 656 F.3d 1002, 1008 (9th Cir. 2011).

ARGUMENT

I. THE SECOND AMENDED COMPLAINT FAILS TO STATE A VIOLATION OF SECTION 1 OF THE SHERMAN ACT

Under its strict terms, Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1196-97 (9th Cir. 2012). Because the statutory language is so broad, the courts have interpreted Section 1 to prohibit only those "unreasonable restraints" of trade. *Id.* (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10; 118 S. Ct. 275; 139 L. Ed. 2d 199 (1997)). Except in rare circumstances, the courts "evaluate whether a practice unreasonably restrains trade in violation of Section 1 under the 'rule of reason.'" *Id.*

In order to state a Section 1 claim under this standard, Plaintiff must plead four elements, including "(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition . . . . [and] (4) that [Plaintiff was] harmed by the defendant's anti-competitive contract, combination, or conspiracy, and that this harm flowed from an 'anti-competitive aspect of the practice under scrutiny.'" *Id.* (quoting *Kendall*, 518 F.3d at 1047 (internal citation omitted)).

Here, because Plaintiff fails, at a minimum, to allege facts that could support the first and fourth elements of a Section 1 violation, the Sherman Act claim should be dismissed with prejudice.

A. Plaintiff Fails To Allege Facts To Plead That ICM Partners Participated In The Formation And Operation Of An Antitrust Conspiracy.

1. Plaintiff Has Not Alleged Facts To Plead That ICM Partners Entered Into An Agreement In Restraint Of Trade.

"[D]iscovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case." *Kendall*, 518 F.3d at 1047. Consequently, courts, including the Ninth Circuit, require plaintiffs to allege specific facts as to each defendant describing the circumstances of the alleged agreement. *Id.* at 1047-48 (affirming order granting motion to dismiss Section 1).

In other words, to pass muster under *Twombly*, conspiracy allegations must "answer the basic questions: who, did what, to whom (or with whom), where, and when?" *Id.* at 1048; *see also In re Musical Instruments & Equipment Antitrust Litig.*, 798 F.3d 1186, 1194 n.6 (9th Cir. 2015) ("*In re Musical Instruments*") (same); *Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, 782 F. Supp. 2d 1059, 1073-74 (E.D. Cal. 2011) (granting motion to dismiss Section 1 claim where Plaintiffs failed to allege any specific details such as "the specific corporate players along with names of key executives," "where the agreement was made, or if there were multiple agreements or one global agreement made at one time"); *Int'l Norcent Tech. v. Koninklijke Philips Elecs. N.V.*, 2007 WL 4976364, at *10 (C.D. Cal. Oct. 29, 2007) (plaintiff "has not alleged when the purported agreement was made . . . who made the decision, how it was made or what the parameters of the agreement were"); Order Granting in Part the Haymon Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) and Order Granting Waddell Defendants' Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) at 17, *Top Rank, Inc. v. Haymon,* No. 2:15-cv-4961-JFW (C.D. Cal. Oct. 16, 2015), ECF No. 85 ("Haymon Order") (granting motion to dismiss claims under Section 1 because, *inter alia*, Plaintiff had alleged only that

the "Defendants were involved in a 'conspiracy,' agreed to enter into an 'illegal scheme,' and 'actively participated in, and materially furthered, the plot to take over the boxing promotion business', [which] are conclusory statements coupled with legal conclusions that cannot support the existence of an agreement to restrain trade in violation of Section 1").

Here, however, the SAC contains no facts describing the origin of the alleged conspiracies and agreements, who participated, when and how, or any other fact necessary to describe their formation and operation. *See* SAC ¶¶ 50, 73, 84, 119. Without more, the factual allegations of the SAC are insufficient to state a claim under Section 1, and the SAC is exactly the sort of imprecise pleading that *Twombly* and *Kendall* prohibit—particularly given the potentially massive discovery expenditures that could be required to proceed on alleged conduct that purportedly spans more than a decade (*see* SAC ¶ 80). Indeed, given the period of time over which Plaintiff claims the alleged "agreements" may have occurred, it is unclear even where ICM Partners should begin in assessing what the alleged conspiracy was, how or when it was formed, or what Plaintiff contends ICM Partners supposedly did to participate in it.

As the Ninth Circuit observed in *Kendall*, because "[a] bare allegation of a conspiracy is almost impossible to defend against, particularly where the defendants are large institutions with hundreds of employees entering into contracts and agreements," antitrust conspiracy allegations should be specific enough to "give a defendant seeking to respond to allegations of a conspiracy an idea of where to begin." 518 F.3d at 1047 (citing *Twombly*, 550 U.S. at 565 n.10.) Complicating matters, Plaintiff lumps together allegations about the "Defendants" rather than alleging facts to show the purported conduct of each individual actor as required to plead a claim under Section 1. *See, e.g.*, SAC ¶¶ 50, 73, 84, 119. This is insufficient to sustain a claim. *In re TFT-LCD Antitrust Litig.*, 586 F. Supp. 2d 1109, 1117 (N.D. Cal. 2008) (granting motion to dismiss Section 1 claims where

plaintiffs failed to "allege that each individual defendant joined the conspiracy and played some role in it" (quoting *In re Elec. Carbon Prods. Antitrust Litig.*, 333 F. Supp. 2d 303, 311-12 (D.N.J. 2004)) and noting that "general allegations as to all defendants, to 'Japanese defendants,' or to a single corporate entity . . . is insufficient to put specific defendants on notice of the claims against them"); *Brennan v. Concord EFS, Inc.*, 369 F. Supp. 2d 1127, 1136 (N.D. Cal. 2005) (granting motion to dismiss Section 1 claim where "the complaint lumps [certain defendants] in with the other bank defendants for purposes of pleading the conspiracy"); *see also* Haymon Order at 10 (granting motion to dismiss claims under Section 1 because, *inter alia*, Plaintiff "has impermissibly relied on group pleading, especially by lumping the . . . Defendants together").

Despite having the benefit of Defendants' motions to dismiss the FAC, which described at length the deficiencies in Plaintiff's conspiracy allegations, Plaintiff did not attempt to add new factual details but instead chose to rest its allegations of conspiracy on the fact that ICM Partners and its alleged co-conspirators are all members of the ATA. SAC ¶¶ 41, 49. But mere membership in a trade association is insufficient to plead an antitrust conspiracy by two or more of its members; Plaintiff must allege facts sufficient to show that each defendant participated in the alleged conspiracy. *Nova Designs, Inc. v. Scuba Retailers Ass'n*, 202 F.3d 1088, 1092 (9th Cir. 2000); *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999). Plaintiff has not done so, after repeated attempts. The Section 1 claim should therefore be dismissed with prejudice.

2. Plaintiff Has Not Alleged Facts To Plead That ICM Partners Engaged In Parallel Conduct From Which It Is Plausible To Infer An Agreement In Restraint Of Trade.

Where a plaintiff fails to plead direct evidence of collusion, "a showing of parallel 'business behavior is admissible circumstantial evidence from which the fact finder may infer agreement.'" *Twombly*, 550 U.S. at 553-54 (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540; 74 S. Ct. 257;

98 L. Ed. 273 (1954)). Still, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy . . . . [Allegations of parallel conduct] must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* at 556-57. To achieve this balance, the Ninth Circuit "has distinguished permissible parallel conduct from impermissible conspiracy by looking for certain 'plus factors.'" *In re Musical Instruments*, 798 F.3d at 1194. "Plus factors" are defined as those "economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action." *Id.*

Here, beyond bare, conclusory allegations that Defendants "conspired" or "agreed," Plaintiff fails to allege that Defendant engage in the same conduct suddenly and simultaneously, *and* that any of the alleged conduct that forms the basis for Plaintiff's Section 1 claim is "inconsistent with unilateral conduct" or "largely consistent with explicitly coordinated action." To the contrary, Plaintiff alleges, at best, that ICM Partners engages in self-interested conduct that "suggest[s] rational, legal business behavior." *Kendall*, 518 F.3d at 1049.

First, Plaintiff suggests that because UTA, ICM Partners, WME, and CAA have received package commissions paid by studios for certain scripted television series, in lieu of charging their clients a 10% commission, the trier-of-fact may infer (from that similar conduct) that Defendants entered into an antitrust conspiracy. *E.g.* SAC ¶¶ 24, 28-29. But Plaintiff also alleges that packages can be lucrative for any agency that can receive them, which means Plaintiff concedes it is economically rational for talent agencies to decide independently to seek out opportunities for their clients for which a package commissions will be paid. *E.g.* SAC ¶ 28 (packaging fees "dwarf[] what the smaller agent (such as Plaintiff) could ever earn"); *id.* ¶ 83 (implying that smaller agencies, such as Plaintiff, would participate in packaging arrangements if they were able). Indeed, Plaintiff's

allegations imply that Plaintiff, too, would offer and participate in packages if it could. *Id.*

More importantly, Plaintiff offers no factual allegations to suggest that UTA, ICM Partners, WME, and CAA suddenly and simultaneously began participating in packaging arrangements, or any other fact suggesting that the decisions were made in "parallel." *In re Musical Instruments*, 798 F.3d at 1195-96 (reasoning that where plaintiffs had alleged only that "defendants adopted [challenged] policies over a period of several years, not simultaneously" that "[a]llegations of such slow adoption of similar policies does not raise the specter of collusion"). To the contrary, Plaintiff affirmatively alleges that television packages have been in use for more than half a century. *See, e.g.*, SAC ¶¶ 28, 34 (referring to "1959 Labor Commissioner's packaging agreement exemption"). That UTA, ICM Partners, WME, and CAA, each acting in its own rational, economic self-interest, received package commissions from studios in lieu of charging their clients a 10% commission, a practice that has been in existence for decades, thus, does not "raise a suggestion of preceding agreement" and is therefore insufficient to state a Section 1 claim. *In re Musical Instruments*, 798 F.3d at 1194.

Second, Plaintiff claims that when a studio agrees to apportion the package commission among two agencies, the recipients of those split packages are more often than not are some combination of UTA, ICM Partners, WME, or CAA. *E.g.* SAC ¶ 73. Yet Plaintiff again fails to allege that the Agencies supposedly adopted policies to co-package only with each other suddenly and simultaneously, and Plaintiff also admits that the Agencies do not co-package with one another *exclusively*. Indeed, Plaintiff alleges that the Agencies split packaging fees with other talent agencies in at least 16 instances in 2014/2015 alone. *Id.* Further, since Plaintiff alleges that packaged scripted television series are created by "tying two or more talent elements together," and Plaintiff admits that the Agencies "represent the world's largest pool of talent," it is unsurprising that when the studios pay a co-

package commission to two agencies for a particular series, the recipients of those split package commissions would be agencies that "represent the world's largest pool" of "top-tiered talent," which basic probability confirms would more often than not include UTA, ICM Partners, WME, or CAA. *See* SAC ¶¶ 73, 94; *see also* SAC ¶ 83.

Indeed, whenever possible, basic economics dictates that it is rational for a talent agency to prefer to retain the entire package commission, rather than being forced to earn less by splitting the commission with anyone else. Thus, far from being conduct "inconsistent with unilateral conduct," the allegation that unilaterally adopting a policy to reduce the number of situations in which an agency could be forced to split package commissions, even if it were true, demonstrates rational business behavior and, if likewise adopted by other agencies, "does not reveal anything more than similar reaction[s] to similar pressures within an interdependent market." *In re Musical Instruments*, 798 F.3d at 1196.

Third, Plaintiff alleges that UTA, ICM Partners, WME and CAA each advocated for the "termination of Rule 16(g)" within the auspices of their roles in the ATA. *E.g.* SAC ¶¶ 49-51. But again, that fact does not permit the inference that UTA, ICM Partners, WME, and CAA entered into an illegal conspiracy: "[M]ere participation in trade-organization meetings where information is exchanged and strategies are advocated does not suggest an illegal agreement." *In re Musical Instruments*, 798 F.3d at 1196. The allegation that the Agencies took part in a trade association and advocated for positions that were in the individual economic self-interest of each (indeed, according to Plaintiff, "in their own best interests," SAC ¶ 50) is also no evidence of collusion because such conduct is equally consistent with independent, economically rational, business decision making. Moreover, as Plaintiff affirmatively alleges, it was SAG—*not ATA*—that ultimately rejected the tentative agreement to continue Rule 16(g). SAC ¶¶ 46-48. Thus, Plaintiff's allegation that UTA, ICM Partners, WME, and CAA "conspired"

to force the termination of Rule 16(g) is implausible on its face and insufficient to state a claim for violation of Section 1.

Finally, Plaintiff alleges that its proposed relevant markets have become more concentrated during the past decade or more. *See, e.g.*, SAC ¶¶71-73. However, the mere fact that the market is concentrated, or has become more concentrated over time, is not a "plus factor" indicating collusion; it would merely be an indication that the "industry is an oligopoly, which is perfectly legal." *See Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1317 (11th Cir. 2003). In any event, there is no allegation in the SAC that the purported decline in the number of talent agencies has any causal link to the antitrust conspiracy that Plaintiff is alleging in this lawsuit. Nor does Plaintiff attempt to connect those dots. To the contrary, Plaintiff admits, and affirmatively alleges, that the number of talent agencies has declined due to natural market forces and independent business decisions, such as mergers and acquisitions with other talent agencies, or the decisions of some agents to close their agencies and become business managers. *See* SAC ¶ 29.

In short, Plaintiff has repeatedly failed to plead any facts from a conspiracy may be inferred, and its Section 1 claim should be dismissed with prejudice.

3. Plaintiff Has Not Alleged Facts To Plead That ICM Partners Coerced Studios, Networks, Or Producers To Refuse To Deal With Plaintiff.

Apart from attempting to allege that the Agencies entered into an illegal conspiracy among themselves, Plaintiff goes on to suggest some form of vertical conspiracy between the Agencies, on the one hand, and the networks, studios, and producers who employ the Agencies' clients, on the other. Specifically, Plaintiff claims that these parties all "conspired and agreed to form a group boycott, whereby buyers of top-tiered talent services," including studios, networks, and producers were "coerced" by the Agencies "to refuse deals with non-core agencies and those they represent (talent)." SAC ¶ 119. Plaintiff claims that the Agencies

orchestrated the alleged boycott by "the use of veiled threats . . . against the buyers of talent services (studios/networks/producers) not to deal with non-core talent agents in the scripted TV market or else face the loss of future packages." *Id.*

But even if true—which they are not—these allegations are insufficient as a matter of law to demonstrate a conspiracy in restraint of trade. The mere fact that a market participant may be able to exert economic pressure on another vertical participant in an attempt to convince it to behave in a certain way is not sufficient, as a matter of law, to state a claim under Section 1. *In re Musical Instruments*, 798 F.3d at 1195 (allegations that vertical players were "pressured" or "coerc[ed]" into adopting certain policies insufficient to establish collusion because "decisions to heed similar demands made by a common, important customer do not suggest conspiracy or collusion"); *see also Monsanto Co. v. Spray–Rite Serv. Corp.*, 465 U.S. 752, 761; 104 S. Ct. 1464; 79 L. Ed. 2d 775 (1984) ("A distributor is free to acquiesce in the manufacturer's demand in order to avoid termination."); *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1158-59 (9th Cir. 1988) ("exposition, persuasion, argument, or pressure" insufficient to establish coercion (citation omitted)); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 53 (2d Cir. 1980) (same); *cf. G.H.I.I. v. MTS, Inc.*, 147 Cal. App. 3d 256, 269; 195 Cal. Rptr. 211 (1983) (allegations of "economic leverage" to "coerce" more favorable terms from vertical distributors insufficient to establish unlawful conspiracy under California's Cartwright Act).

Thus, Plaintiff's claim that the UTA, ICM Partners, WME, and CAA exert economic pressure on studios, networks, and producers who employ directors, writers, and actors for scripted televisions series to refuse to deal with other agencies, such as Plaintiff, (SAC ¶ 119), even if it were not untrue, is insufficient as a matter of law to plead a conspiracy in restraint of trade. *Monsanto Co.*, 465 U.S. at 761; *In re Musical Instruments*, 798 F.3d at 1195. The Section 1 claim must therefore be dismissed.

4. The Random Antitrust "Buzz Words" In The Second Amended Complaint, Without Any Accompanying Factual Allegations, Also Fail to State a Claim Under Section 1.

It is well-established that antitrust buzz words or "magic words" standing alone are legal conclusions and, without more, are insufficient to state a claim under Section 1. *Int'l Norcent Tech.*, 2007 WL 4976364, at *10 (referring to insufficiency of "magic words" like "conspiracy"); *see also Twombly*, 550 U.S. at 557. Nonetheless, in a last ditch effort to support its claim, Plaintiff peppers the SAC with antitrust buzz words, untethered to any factual or logical support. Plaintiff alternatively alleges that Defendants have engaged in "horizontal price fixing," "market division," "allocating . . . [the] market," and "tying." *E.g.* SAC ¶¶ 73, 83-84, 119-20. Yet nowhere does Plaintiff plead any facts that could support any of the elements of those potential violations. Nor does Plaintiff attempt to articulate a legal theory under which the alleged conduct would constitute a claim of relief.

For instance, with respect to "tying," Plaintiff fails to allege any agreement between Defendants and their alleged co-conspirators, or to suggest which products are "tied" together. *See Brantley*, 675 F.3d at 1199 (defining tying arrangements as "an agreement where a supplier agrees to sell a buyer a product (the tying product), but 'only on the condition that the buyer also purchases a different (or tied) product'") (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5; 78 S. Ct. 514; 2 L. Ed. 2d 545 (1958)). To the contrary, Plaintiff claims only that Defendants have agreed not to share fees from a single product—the package—with other talent agencies. SAC ¶ 73. Similarly, the SAC contains no factual allegations describing an agreement to fix prices or allocate markets, such as how the market has been allocated amongst the alleged co-conspirators or any reduction in competition between them. Rather, Plaintiff's own allegations prove that the market lacks one or two dominant agencies, that Defendants and their alleged co-conspirators remain

in hot competition with one another, and that packaged scripted series opportunities have more than doubled. *See* SAC ¶ 73 & Exs. C, F–H.

Finally, Plaintiff's liberal use of the antitrust buzz words "predatory pricing" does not state a claim under Section 1. Predatory pricing typically involves unilateral conduct that may be actionable under Section 2 of the Sherman Act—which claim the Court dismissed in connection with the FAC, and which Plaintiff elected not to re-plead in the SAC. Order at 7. In any event, in order to plead predatory pricing, Plaintiff must include factual allegations to demonstrate that Defendants priced below their costs and then later had a dangerous probability of recouping their losses by charging supracompetitive prices after rivals were eliminated or substantially weakened during the predation period. *See, e.g.*, *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433-34 (9th Cir. 1995) (describing two "stages" of predatory pricing, including a "price war" stage in which defendant "prices below its marginal cost hoping to eliminate rivals," followed by a "recoupment" stage in which defendant "can collect the fruits of the predatory scheme by charging supracompetitive prices"). Yet Plaintiff affirmatively alleges that packaging fees are profitable, and therefore cannot plausibly allege that Defendants are pricing below their costs. *E.g.* SAC ¶¶ 24, 28.

Because Plaintiff fails in every instance to plead sufficient facts to demonstrate a conspiracy, the Section 1 claim should be dismissed with prejudice.[3]

[3] Although claims under California's UCL do not necessarily require proof of conspiracy, where a plaintiff bases a UCL claim entirely upon a purported conspiracy, then the UCL claim rises and falls with the alleged conspiracy. *See Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 866-67; 107 Cal. Rptr. 2d 841; 24 P.3d 493 (2001). Here, because Plaintiff has failed to adequately plead a conspiracy, its UCL claim likewise must fail. Although the Court previously ruled that the UCL claims could stand, the Court has inherent authority to revisit interlocutory orders and to change them at any time prior to final judgment or permission is granted for appeal. *Marconi Wireless Tel. Co. of Am. v. United States*, 320 U.S. 1, 47; 63 S. Ct. 1393, 1415; 87 L. Ed. 1731 (1943); *City of L.A., Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001).

B. Plaintiff Fails To Allege That It Suffered Any Antitrust Injury.

"It can't be said often enough that the antitrust laws protect competition, not competitors." *United States v. Syufy Enters.*, 903 F.2d 659, 668 (9th Cir. 1990). Thus, to sustain a private right of action for an alleged federal antitrust violation, a private plaintiff must plead that it "[was] harmed by the defendant's anti-competitive contract, combination, or conspiracy, and that this harm flowed from an 'anti-competitive aspect of the practice under scrutiny.'" *Brantley*, 675 F.3d at 1197 (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334; 110 S. Ct. 1884; 109 L. Ed. 2d 333 (1990) ("*ARCO*"). But "while 'conduct that eliminates rivals reduces competition,' 'reduction of competition does not invoke the Sherman Act until it harms consumer welfare.'" *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 848 (9th Cir. 1996) (quoting *Rebel Oil*, 51 F.3d at 1433). In other words, to state a claim, a private plaintiff must allege facts that plausibly demonstrate harm not to competitors but to consumers, meaning an increase in price or reduction in output. *Sterling Merch., Inc. v. Nestle, S.A.*, 656 F.3d 112, 121 (1st Cir. 2011); *Reudy v. Clear Channel Outdoors, Inc.*, 693 F. Supp. 2d 1091, 1128 (N.D. Cal. 2010); *see also Rebel Oil*, 51 F.3d at 1433. In this regard, "a decrease in profits from a reduction in a competitor's prices, so long as the prices are not predatory, is not an antitrust injury." *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1035 (9th Cir. 2001); *cf. ARCO*, 495 U.S. at 340.

Plaintiff cannot demonstrate antitrust injury because the SAC does not allege facts to show that Plaintiff suffered harm *as a result of* any alleged anticompetitive conduct. Plaintiff's sole alleged injury is the loss of Clients #1 and #2.[4] Nowhere

[4] Although Plaintiff also refers to loss of choice and diversity in support of its claim, these do not constitute actionable antitrust injuries either. As the Ninth Circuit has explained, even if an "agreement has the effect of reducing consumers' choices or increasing prices," that "does not sufficiently allege an injury to competition" because each is "fully consistent with a free, competitive market." *Brantley*, 675 F.3d at 1202. In the absence of injury to competition, such concerns are simply not actionable. *See id.*

does Plaintiff allege that Clients #1 and #2 left *because* Defendants or their alleged co-conspirators refused to split a particular package with Plaintiff, or *because* buyers of talent refused to employ Clients #1 or #2 due to some fear of, threat from, or loss of opportunity at the hands of Defendants—to the contrary, Plaintiff alleges that these clients left because Defendants offered them lower commissions. *See, e.g.*, SAC ¶ 27. Consequently, Plaintiff's complaint stems from *more* vigorous competition, not less. *See, e.g.*, *ARCO*, 495 U.S. at 339. Plaintiff's injury, thus, is merely an injury to a competitor (Plaintiff), not to competition and is not an actionable antitrust injury. *Cf. Watkins & Son Pet Supplies v. Iams Co.*, 254 F.3d 607, 616 (6th Cir. 2001) (where Plaintiff alleged that manufacturer granted exclusive contract to Plaintiff's competitor and terminated a distribution contract with Plaintiff, holding that Plaintiff failed to plead antitrust injury "because the injury to [Plaintiff] flows from the termination; the antitrust violation was not a necessary predicate of the injury").

In this respect, circumstances here mirror those in the court's recent decision in *Top Rank, Inc. v. Haymon*. There, the court granted Defendants' motion to dismiss claims under Section 1 for lack of antitrust injury where Plaintiff had claimed that Defendants had "frozen" competing boxing promoters out of the market by blocking venues, preventing them from promoting, and inducing networks to refuse to broadcast certain promotors' fights. Haymon Order at 7. The court pointed out that although this conduct might have caused some competitors to suffer an antitrust injury, Plaintiff had "not identified a single bout that it has attempted to promote but was precluded from promoting by the [] Defendants, a single venue from which it has been blocked, or a single network that has refused to broadcast a fight promoted by [Plaintiff]." *Id.* Thus, Plaintiff had failed to allege any facts demonstrating that it had suffered any antitrust injury. Likewise, here, where Plaintiff has not identified a single package or co-package that it was

refused, or a single studio, network, or producer that has refused to deal with Plaintiff or Plaintiff's clients.

Because Plaintiff has had multiple opportunities and has failed to plead facts to show how ICM Partners participated in the formation and operation of any antitrust conspiracy, or facts that could show that Plaintiff has suffered antitrust injury, the Section 1 claim should be dismissed with prejudice.

II. THE SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

"The elements of interference with prospective economic advantage resemble those of intentional interference with contract. They are: '(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.'" *CRST Van Expedited, Inc. v. Werner Enters., Inc.*, 479 F.3d 1099, 1107-08 (9th Cir. 2007) (Citation omitted).

Because interference often signals vigorous competition, not all acts of interference are actionable in California. To protect healthy competition, California has adopted the doctrine of competitor's privilege: "Perhaps the most significant privilege or justification for interference with a prospective business advantage is free competition." *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 389; 45 Cal. Rptr. 2d 436 (1995). Thus, in order to plead a claim for interference with prospective economic advantage, Plaintiff must affirmatively "allege an act that is wrongful independent of the interference itself." *CRST Van Expedited*, 479 F.3d at 1108. "[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Id.* at 1109.

As the Court previously recognized in its Order, Plaintiff relies on the alleged Sherman Act violations to satisfy the independently wrongful act element of its interference with prospective economic advantage claim. Order at 10; *see also* SAC ¶ 138. Plaintiff's allegations in the SAC do nothing to save its Sherman Act claim, for the reasons discussed above; thus, the interference with prospective economic advantage claim must likewise be dismissed with prejudice.

III. THE SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR INTENTIONAL INTERFERENCE WITH CONTRACT

As discussed above, California has adopted the doctrine of competitor's privilege as a bar to interference claims. *See Della Penna*, 11 Cal. 4th at 389 (discussing competitor's privilege and holding that a plaintiff must plead wrongful conduct to state an interference claim). Although the competitor's privilege does not apply to all interference with contract claims, the privilege does apply to interference with contracts that are terminable at will. *See, e.g.*, *Pac. Express, Inc. v. United Airlines, Inc.*, 959 F.2d 814, 819 (9th Cir. 1992). Thus, as the Court previously recognized, Plaintiff must either adequately allege that the purported contractual relationship between it and Client #2 was for a specified term, rather than terminable at will, or Plaintiff must plead an independently wrongful act for the tortious interference with contract claim to survive. *See* Order at 9; *see also* *Reeves v. Hanlon*, 33 Cal. 4th 1140, 1152; 17 Cal. Rptr. 289; 95 P.3d 513 (Cal. 2004) (discussing independently wrongful act element). Plaintiff has alleged neither.

First, as discussed above, Plaintiff has failed to plead a violation of Section 1 of the Sherman Act. Thus, Plaintiff has not pleaded an independently wrongful act to defeat the competitor's privilege. *See* Order at 9; *cf.* SAC ¶ 138.

Second, Plaintiff failed to allege any additional facts establishing that the purported agreement between it and Client #2 was for a specified term rather than terminable at will. In its SAC, Plaintiff now acknowledges that there was no

written contract with Client #2, instead alleging that "there was a verbal contract, with specific terms." SAC ¶ 128. Plaintiff claims that this verbal contract with Client #2 "commenced on or about February 10, 2009, for an initial term of 2 years, with a 2-year renewal term, followed by 1-year terms," but Plaintiff fails to plead whether Client #2 elected to renew, under what terms such renewal occurred, or whether any term was in effect at the time that Client #2 "terminat[ed]" his contract with Plaintiff in June of 2014. *Id.*

Tellingly, rather than alleging that the verbal contract itself was not terminable at will, Plaintiff relies upon Rider D to the ATA/DGA Agreement and argues that Client #2 could not terminate the alleged verbal contract because Client #2 signed an employment contract with a third party to direct one episode of "Lottery" on June 18, 2014, eight days before Client #2 terminated his relationship with Plaintiff. *Id.* ¶ 128. But Plaintiff's new allegations do not salvage its interference with contract claim because such a verbal contract would not be enforceable, as a matter of law; and because Rider D cannot apply to create a term agreement where there was none to begin with.

At the outset, even if Plaintiff's allegations could plausibly be read to suggest that the alleged verbal agreement with Client #2 was for a specified term rather than terminable at will—which it cannot—the agreement still would not be enforceable because it would run afoul of the statute of frauds. This is so because a verbal agreement with the alleged terms, namely an initial term of two years, followed by a two-year and multiple one-year renewal terms, could not possibly be performed within a year. *Rosenthal v. Fonda*, 862 F.2d 1398, 1400-01 (9th Cir. 1988). Thus, at most, Plaintiff's alleged verbal contract with Client #2 was terminable at will.

Plaintiff's reliance upon Rider D fares no better. Although Plaintiff fails to attach Rider D to the SAC, Plaintiff is referring to the Agreement between the Association of Talent Agents and Directors Guild of America, Inc. of January 1, 1977 (as restated January 1, 2004) (the "ATA/DGA Agreement"). *See* RJN, Ex. A.

The purpose of the ATA/DGA Agreement is to promulgate a Code of Fair Practice which establishes minimum practices in the relationship between agents and DGA members, eliminates certain undesirable practices, and introduces a uniform procedure in the agency relationship.[5] *Id.* at 1. To that end, the ATA/DGA Agreement provides that Rider "D" "shall be attached to, and made a part of existing or future agency contracts between DGA members and agents . . . with respect to services to be rendered by said DGA members as Directors." *Id.*

Plaintiff relies upon a tortured misinterpretation of Rider D for its argument that Client #2 was prohibited from terminating Plaintiff. SAC ¶ 128. It is clear from the plain language of Rider D's 90 Day Clause that its purpose is not to prevent a DGA member from terminating a verbal agreement with no specified term, but rather to provide the DGA member with the ability to terminate an unfruitful agreement with a specified term, by delivering written notice. *See* RJN Ex. A at 14-15 (dictating that, in the event of a fruitless relationship, "either Director or Agent may terminate the employment of Agent"). Otherwise, a DGA member could be locked into a long-term exclusive relationship with an agent who has been unable to generate any fruitful employment opportunities.

Plaintiff's reliance on subparagraph (C) of the 90 Day Clause is also misplaced. Subparagraph (C) merely contains one of the "terms and provisions" for the application of the 90 Day Clause. *Id.* at 14. While the ATA/DGA Agreement is expressly limited to the representation of DGA members as Directors, subparagraph (C) provides that employment or a bona fide offer for employment in another field, such as an Executive Producer, may in certain circumstances be counted for the purpose of determining whether the Director-member can invoke the 90 Day Clause. *Id.* Therefore, if Plaintiff had a written, two-year exclusive agency contract with Client #2 for his directing services (governed by the ATA/DGA

[5] It is worth noting that Paragraph 17 of the ATA/DGA Agreement expressly approves of the practice of packaging. *See id.* at 4-5.

Agreement and therefore incorporating the terms contained in Rider "D"), and obtained a bona fide offer as an Executive Producer satisfying the requirements of subparagraph (C) within the last 90 days, Client #2 would be unable to invoke the 90 Day Clause to terminate the written contract.

Here, because Plaintiff did not have a written contract with a specified term, Client #2 did not need to invoke the 90 Day Clause to terminate his relationship with Plaintiff, and whether or not specific employment qualifies under subparagraph (C) is irrelevant.

Thus, because Plaintiff has failed to plead any facts demonstrating that the alleged contract was for a specified term rather than terminable at will, and because Plaintiff failed to plead any independently wrongful act to defeat the competitor's privilege, Plaintiff's intentional interference with contract claim must be dismissed.

CONCLUSION

For the foregoing reasons, ICM Partners respectfully requests that the Court dismiss the entire SAC with prejudice.

DATED: November 9, 2015

PERKINS COIE LLP

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